FOR ARGUMENT

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In The

Supreme Court of the United States

October Term, 1977

No. 77-1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DEPASQUALE, County Court Judge of Seneca County, New York, *et al.*,

Respondents.

On Writ of Certiorari to the State of New York Court of Appeals

REPLY BRIEF OF PETITIONER

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1. The American Bar Association standard relied upon by Respondents and the Court of Appeals has been officially modified and now supports the position of Petitioner

In August, 1978, the American Bar Association adopted its new Criminal Justice Standards. Section 8-3.2 provides that pretrial proceedings may be held *in camera* only after a showing that (1) dissemination of information from a public proceeding would create a clear and present danger to the fairness of the

trial and (2) the prejudicial effect of that dissemination cannot be avoided by reasonable means other than closure. *ABA Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press*, §8-3.2 (1978). That approved standard is identical to the draft version set forth in the Brief of Petitioner (Pet. Brief at 32 n. 17). Its predecessor, which more readily sanctioned secrecy and upon which both Respondents (Resp. Brief at 23) and the Court of Appeals (Cert. 10a) relied, has been abandoned.

2. Respondents' belated attempt to find factual justification for the ejection order is not supported by the Record

Respondents assert that ejection of the press and public was "overwhelmingly justified" (Resp. Brief at 30-34). They attempt to support that contention, not by reliance upon the facts of this case, but by vague allusions to matters which are not part of the Record. Ultimately, they hypothesize that "Judge DePasquale was certainly aware of all the necessary factors when he considered the defendant's motion for closure." *Id.* at 33. Respondents' factual argument is untenable.

The Record before this Court shows that Respondents, both at the suppression hearing and in the Appellate Division, took the position that no factual showing was necessary to eject the public and press from pretrial hearings. No newspaper articles or other evidence were submitted to, or considered by, Judge DePasquale when he evicted observers from the courtroom (A. 4-6). When asked by counsel for Gannett to vacate his secrecy order, Judge DePasquale stated that there were no "authorities that make it incumbent upon the defendant, or defendants in this case, to present a factual basis for the exclusion of the public and press" (A. 14). Judge DePasquale did not respond when he was requested to describe how the defendants would have been prejudiced by a public hearing, and why alternatives to closure

would have been inadequate to protect their right to a fair trial (A. 16-18). Gannett's commencement of an original proceeding in the Appellate Division gave Respondents still another opportunity to submit proof tending to justify the closure. N.Y. Civ. Prac. Law and Rules § 7804 (McKinney Supp. 1977-78). Again, they did not do so.[1] Instead, Respondents now seek to justify the ejection by reference to irrelevant matters outside the Record.

After the courtroom was closed and Judge DePasquale denied Gannett's motion to reopen it, Gannett placed in the Appellate Division Record the pre-closure newspaper articles which had been published in Rochester's morning *Democrat & Chronicle* and evening *Times-Union*. Respondents' Brief, however, does not limit itself to a discussion of those articles. Apparently recognizing that Gannett's articles did not justify closure, Respondents simply list, for the first time, the total circulation of six other Upstate New York newspapers,[2] but point to only

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[1]Indeed, Respondents' Answers to Gannett's Appellate Division pleadings disclaimed any knowledge of pretrial publicity. Paragraphs 7 and 8 of Gannett's Petition alleged that the criminal case was the subject of great public interest, and that numerous newspaper articles had been written concerning it (A. 23). The Answers of all Respondents denied "any knowledge or information sufficient to form a belief as to the truth" of those allegations. (Answer of Respondent DePasquale at ¶2; Answer of Respondents Greathouse, Jones and Ward at ¶2.)

[2]Respondents' circulation figures are somewhat misleading. The *Ithaca Journal*, to which Respondents attribute a total circulation of 20,218, had a circulation in Seneca County of 638. American Newspaper Markets, Inc., *Circulation 77/78* 522 (1977). The *Geneva Times*, with a total circulation of 17,906, had a Seneca County circulation of 5,704. *Id.* Respondents declare that the circulation of the Syracuse *Post Standard* was 245,507; its circulation in Seneca County, however, was only 755. *Id.* Similarly, the Syracuse *Herald Journal*, although claimed to have a total circulation of 85,574, had a circulation in Seneca County of 1,550. *Id.* Finally, the Auburn *Citizen Advertiser*, with a total circulation in excess of 18,000, was not circulated in Seneca County. *Id.*

one article pertaining to the Clapp case in only *one* of those publications. Although that article was printed five weeks *after* the closure of the hearing,[3] Respondents nevertheless imply that publicity in those other newspapers somehow justified the ejection orders (Resp. Brief at 31). That implication should obviously be disregarded by this Court.

Continuing, Respondents focus on the word "sample" in Gannett's Appellate Division petition (A. 23) to further suggest that prejudicial Rochester newspaper items existed, but were not included by Gannett in the Record (Resp. Brief at 4, 30). Their implication is again unsound. Gannett did not "select" articles favorable to its cause. Every article concerning the Clapp case which had been published in the Rochester papers prior to the closure of the courtroom is contained in the Record before this Court.[4]

The Record in this case and the allegations in Respondents' Brief do no more than show the concern of citizens and the press with the administration of their government — a concern at the "core" of First Amendment objectives.

[3]The article discusses the pleas of guilty to lesser included crimes entered by both defendants in mid-December, 1976 (Resp. Brief at 31 n. 34).

[4]A number of additional articles, dealing with Gannett's legal challenge to the closure orders, were published after the closure, but before the preparation of Gannett's papers in the Appellate Division. Those news reports, which appeared both in the Rochester papers and elsewhere, were (with the exception of A. 48-51) not included by Gannett in the Record. Their existence (and the possible existence of other articles unknown to Gannett) was the reason why the term "sample" was used.

3. Respondents' "factual justification" for the ejection order demonstrates the danger of excessive secrecy occasioned by the opinion of the Court of Appeals

Respondents' visceral allusions to "facts" not in the Record before this Court should be discounted, but not disregarded. They demonstrate the facility with which parties seeking to close hearings, pursuant to the guidelines of the Court of Appeals, can invent a "threat" to a fair trial when none exists. Indeed, the implications of prejudice contained in Respondents' Brief are representative of those unsubstantiated arguments which are being asserted to close courtrooms throughout New York State.[5]

[5]Pet. Brief at 23; *accord*, Brief of New York Times Company as *Amicus Curiae* at 2; *see* Twentieth Century Fund Task Force on Justice, Publicity and the First Amendment, *Rights in Conflict* 5 (1976). *People v. Jacob Thomas*, Ind. No. 77-189, a murder case prosecuted in County Court, Chautauqua County, New York (Adams, J.) is but an example. The following colloquy took place in that case on March 14, 1978:

"[Defense Counsel] . . . [O]n behalf of the defendant, we would move to make this hearing a private hearing, in the sense that the public — including the press — be excluded . . . The main argument that we wish to make is that even though the information which is taken up here would not necessarily and directly be of a substantive nature, the cross examination of witnesses, statements made by them in connection with them, will, of necessity, go into substance, some of which may be inadmissible at the trial; and, in that way, we feel it would prejudice this defendant from getting a fair trial . . .

"[W]e feel that any publicity from this hearing would be prejudicial to the ability to draw a jury and get a fair trial. I would like to quote from Gannett vs DiPasquale [*sic*], . . . there is any possibility that you would be unable to get a panel of veniremen or jurymen for a trial because of what has taken place at a preliminary hearing or a suppression hearing, then such pre-trial evidentiary hearings in this state are presumably to be closed to the public. *It seems as though there is some kind of presumption that a defendant would be entitled to, because we don't know what will come forward in this hearing, and we don't know what will be prejudicial, and if it does come out, there is just nothing that can be done about it*, so we ask

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Although those closures are seldom reported officially, secrecy is continuing to spread.

For example, Respondents, relying on the logic of the Court of Appeals, advocate that not only the suppression hearing, but the motion for closure itself, should be hidden from public scrutiny.[6]

—Footnote continued from preceding page

> the Court to exercise its discretion now, on behalf of the defendant, and for a fair trial.
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> . . .
>
> ". . . For you or I to anticipate something, that is impossible, and, therefore, to be sure, and to protect the defendant and to ensure a fair trial which can be reported in every newspaper . . . we would ask that the proceedings be made non-public. . . .
>
> "THE COURT: . . . The precedent has been set by our Court of Appeals. Quoting from the dissent in the Court of Appeals, *'The guidelines expressed by the majority, signal the common, if not certain, locking of the courtroom door, virtually whenever requested, in pre-trial hearings,'* — I have skipped something. 'However, of greater concern is that the majority has turned the burden of proof around.'
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> "So, I must base my ruling not on what I personally believe is proper, and I am not giving any indication of that, whatever, but only on what *I am bound by, by the highest court of the State of New York.*
>
> . . .
>
> "THE COURT: This case came up through the Fourth Department. The Appellate Division of the Fourth Department was unanimously in agreement with the position stated by the Ogden Newspapers. *The Court of Appeals, by a four to two decision, reversed, and, as pointed out, has shifted the burden of proof to the press to show more than a mere curiosity. In accordance with the request of the defendant, this Courtroom is now cleared to the public.* All the public will leave — members of the press, and all others. There is a provision for redacted transcripts in the case, which I shall follow [emphases supplied]."

[6] "However, care must be taken, lest in discussing the closure motion, the evidence which may be suppressed is described in such detail that the motion is self-defeating. Where the substance of statements or circumstances of questioning or seizures must be considered, the court should hear this testimony in camera." Resp. Brief at 39.

Again, in *Buffalo Courier Express, Inc. v. Stiller*, 62 AD2d 1173 (4th Dept. 1978), a suppression hearing in a Buffalo, New York murder case was ordered closed notwithstanding the fact that two defendants were off-duty Buffalo police officers; the District Attorney had indicated that nothing prejudicial to a fair trial would be introduced at the hearing; and allegations had been made that "members of the Buffalo Police Department attempted to cover up aspects of the . . . death."[7] *See People v. Berkowitz*, 93 Misc 2d 873, 403 N.Y.S.2d 699 (Sup. Ct. Kings 1978) (competency hearing closed).

The opinion below has also been relied upon in contexts distinct from criminal proceedings. For example, in *Quinn v. Aetna Life and Casualty Co.*, ____Misc2d____, 4 Med. L. Rptr. 1049 (Sup. Ct. Queens, 1978), the court held that a cause of action, seeking to enjoin advertisements critical of large jury verdicts in personal injury cases, was viable on the ground that such advertisements interfered with the right of negligence plaintiffs to a fair trial. The advertisements did not relate to any specific civil action, nor was there any civil trial pending or imminent. The parties seeking to enjoin the advertisements were simply plaintiffs in undifferentiated personal injury litigation. The court relied heavily upon the opinion of the Court of Appeals in this case, stating:

> "The rationale of Gannett is very much applicable to the instant action; that is, information which threatens the impaneling of an impartial jury may be restrained despite the First Amendment." *Id.* at 1054.

In conclusion, we do not contend that the public and press have an absolute right to be present during all phases of the judicial process, nor do we question the importance of the right of every accused to be fairly tried before an impartial jury. We say simply that the rights of the press and the public to scrutinize and be informed of criminal trials and hearings — rights secured by the First and Sixth Amendments — are equally as important to our society.

[7] Record at 5-7, *Buffalo Courier Express, Inc. v. Stiller, supra.*

The fears articulated by Respondents in this case are not new. *Reynolds v. United States*, 98 U.S. 145 (1878). Nor are they realistic in "the overwhelming majority of criminal trials." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 551 (1976).

> "There can be no ducking of the problem of the press prejudicing trials even if the occurrence is seldom and is almost solely confined to the *causes célèbres*. But the solutions that we seek must be appropriate to the difficulties, both to their nature and to their frequency. The question is not a matter of neglecting to find a remedy but to find one no more painful than the illness demands." A. Friendly and R. Goldfarb, *Crime and Publicity* 71 (1967).

The "workable compromise" sought by all the parties before this Court is found neither in the opinion of the Court of Appeals nor in the Brief of Respondents. The only "workable compromise" acceptable to a free society is derived from the First and Sixth Amendments. It must ensure that secret judicial proceedings take place, if at all, only as an absolutely last resort. When the courtroom door is closed, "it closes all doors behind it." *Pennekamp v. Florida*, 328 U.S. 331, 350 (1946). The accommodation appropriate to this case was articulated by this Court in *Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 562-65.

The judgment below should be reversed.

Respectfully submitted,

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